

- NORLC Terms of Reference
- ORAP Charter and membership
- Annual Report to Congress

NOPP - Status

(as of mid-Sept. 1997)

FY 99 and outyears

- Ten agencies have indicated interest in supporting the Partnership Program in the outyears
- Agencies developing budgets (Navy, NSF, NOAA indications)
- Mechanism for budgeting: An NORLC Agenda
- Item at next meeting
- Congress working on "NOPA 2" - FY98
  - Same fundamental components, plus additional element - Ocean observations (\$ 1 OM)
  - Navy requested ~\$5M in the FY98 PRESBUDG
  - FY98 Defense Authorization provides Navy additional \$16M for NOPP in 6.2 and \$7.5M in O&MN for University ships to work on Navy operational surveys
  - NORLC Structure - in resolution
- Linkage to intn'l efforts - Year of the Ocean
- Next BAA: out in October

The National Oceanographic  
Research Leadership Council

SECNAV

NSF Dir.

DEPSEC Energy

Coast Guard Comm.

MMS Dir.

OSTP Dir.

NOAA Admin.

NASA Admin.

EPA Admin.

USGS Dir.

DARPA Dir.

OMB Dir

7 others (NAS, NAE, IoM, State Gov.,  
Academia, Industry, TBD)--Maybe.

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## **APPENDIX XII. LOS and the Academic Research Scientist**

### **LOS AND THE ACADEMIC RESEARCH SCIENTIST**

J. Ashley Roach (1)

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U.S. Marine Scientific Research Policy

The LOS Convention solidifies coastal State control over Marine Scientific Research (MSR) in waters subject to their jurisdiction, waters which now encompass considerably more of the globe now than in 1958 (2). Nevertheless, U.S. policy is to encourage freedom of marine scientific research. That policy was fostered by the U.S. decision, first stated in the President's Oceans Policy Statement of March 10, 1983, (3) and reaffirmed in October 1994 in the documents transmitting the LOS Convention to the Senate,(4) to not claim jurisdiction over MSR in its EEZ, a right provided for under international law reflected in the LOS Convention. The United States declined to assert jurisdiction in its EEZ over MSR because of its interest in encouraging MSR

and promoting its maximum freedom while avoiding unnecessary burdens. The Department of State is charged with facilitating access by U.S. scientists to foreign EEZ's under reasonable conditions. Consequently, since 1983 the U.S. requests permission through diplomatic channels for U.S. research vessels to conduct MSR within 200 miles of a State asserting such jurisdiction.(5)

The United States does not claim jurisdiction over fisheries research except when it involves commercial gear or commercial quantities of fish, and even then it may qualify as scientific research. The United States does, however, claim jurisdiction over marine mammal research (6).

#### Role of the U.S. State Department in MSR

Within the Bureau of Oceans and International Environmental and Scientific Affairs (OES) is the Office of Ocean Affairs (OA), a division of which is the Marine Science and Technology Affairs Division (OA/MST).

The Marine Science Division is responsible for assuring that U.S. policy is adhered to in acquiring permission from the coastal State, when required for such research, and for coordinating and processing of the request, as well as in processing requests from foreign researchers to conduct MSR in the U.S. territorial sea.

OES is headed by Assistant Secretary Elinor Constable. The Deputy Assistant Secretary for Oceans is Ambassador David Colson (OES/0). The Office of Ocean Affairs is headed by Tucker Scully, and the Director of the Marine Science Division is Bill Erb. Mr. Erb is ably assisted by Mr. Tom Cocke, who is charged with processing all applications to conduct MSR.

#### Definitions

Coastal State jurisdiction over foreign marine scientific research differs depending on which activity is involved and on the maritime zone in which it is conducted.

The LOS Convention does not define the terms "marine scientific research", "survey activities", "hydrographic survey", or "military survey". However, the concepts are distinct.

#### MARINE SCIENTIFIC RESEARCH

The United States accepts that "marine scientific research" (MSR) is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes (7). MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. It is distinguished from hydrographic survey, from military activities, including military surveys, and from prospecting and exploration (8).

#### HYDROGRAPHIC SURVEY

The generally accepted modern international interpretation of "hydrographic survey", which is shared by the United States, is to obtain information for the making of navigational charts and safety of navigation. It includes determination of one or more of several classes of data in coastal or relatively shallow areas--depth of water, configuration and nature of the natural bottom, directions and force of currents, heights and times of tides and water stages, and hazards for navigation--for the production of nautical charts and similar products to support safety of navigation, such as Sailing Directions, Light Lists and Tide Manuals for both civil and military use (9). Coastal, harbor and harbor approach charts and other products are published by the U.S. Defense Mapping Agency and made available to mariners of all nations (10).

In many areas of the world, the production of up-to-date charts has had a positive impact on economic development in coastal areas, stimulating trade and commerce and the construction

or modernization of harbor and port facilities. By helping safety of navigation for ships transiting off-shore, up-to-date charts also play a role in protecting coastal areas from the environmental pollution which results from wrecks of freighters and tankers carrying hazardous cargoes. Data collected during hydrographic surveys may also be of value in coastal zone management and coastal science and engineering.

## MILITARY SURVEYS

The United States considers that military surveys refer to activities undertaken in the ocean and coastal waters involving marine data collection (whether or not classified) for military purposes. Military surveys can include oceanographic, marine geological, geophysical, chemical, biological and acoustic data. Equipment used can include fathometers, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters and profilers. While the means of data collection used in military surveys may sometimes be the same as that used in MSR, information from such activities, regardless of security classification, is intended not for use by the general scientific community, but by the military (11).

## SURVEY ACTIVITIES

This term is used to include hydrographic surveys and military surveys.

## MILITARY ACTIVITIES

Military activities include launching and landing of aircraft, operating military devices, intelligence collection, weapons exercises, and military surveys.

## Legal Regimes Under the 1958 Geneva Conventions

Prior to the Third LTN Law of the Sea Conference, each coastal State possessed sovereignty over a narrow territorial sea and sovereign rights over its continental shelf for the purpose of exploring and exploiting its natural resources. High seas freedoms, including the freedom to conduct MSR and surveys, pertained in the water column seaward of the territorial sea, including over the continental shelf, and of the seabed seaward of the outer limits of exploitability of the continental shelf.

The United States is a party to the four 1958 Geneva Conventions on the Law of the Sea, which established a regime -- of sorts -- for MSR and surveys. The Continental Shelf Convention recognizes coastal State jurisdiction over MSR involving the continental shelf and physically undertaken there, but is silent regarding surveys. The coastal State is normally expected to give its consent if the request is in connection with purely scientific research and is submitted by a qualified institution. The coastal State has the right to participate or be represented in research. The results of the research must be published (12). The High Seas Convention, expressly codifying customary international law, recognizes the freedom of the seas, including the water column over the continental shelf, without specifically mentioning MSR or surveys as one of those freedoms among the illustrative list of freedoms (13). Nevertheless, the conduct of MSR is regarded as an exercise of the freedom of the high seas (14). The Convention on the Territorial Sea and the Contiguous Zone is silent on MSR and surveys, except to provide that the territorial sea and subjacent seabed and subsoil are under the sovereignty of the coastal State." It follows that the consent of the coastal State must be obtained for research work in its territorial sea." The Fishing Convention" is silent on marine scientific research. Thus, the 1958 Geneva Conventions contain very little treaty law on MSR and marine surveys (18). Nevertheless, prior to the LOS Convention, freedom of MSR and to conduct marine surveys existed in most of the oceans seaward of the narrow territorial sea, and of the seabed seaward of 200 meters depth or where the continental shelf could not be exploited.

## Legal Regimes Under the LOS Convention

During that decade-long negotiations that culminated in the adoption on December 10, 1982, of the UN Convention on the Law of the Sea, the United States sought to maximize the areas in which MSR could continue to be conducted free of coastal State control, to create a regime that maximized timely and unencumbered access by foreign researchers to areas under coastal State jurisdiction, and to maintain the right to conduct marine surveys seaward of the territorial sea free of coastal State control. These negotiations were conducted in the context of increasing acceptance of a 12-mile territorial sea under coastal State sovereignty, of the 200-mile exclusive economic zone (EEZ) under coastal State jurisdiction for economic purposes, and of an expanded continental shelf that was at least 200 miles wide, and could be even wider for the broad-margin States such as the United States.

The results of those difficult negotiations resulted in a diminution of the oceanic areas in which there was freedom of MSR, coupled with a consent regime for MSR in the EEZ and on the subjacent continental shelf, (19) while the freedom to conduct marine surveys was largely unchanged (20). In 1983, the President decided that, Part 3U aside, the rest of the LOS Convention supported U.S. interests, including that of encouraging freedom of marine scientific research (21).

During the decade following adoption of the LOS Convention, questions arose as to the legal status of the non-seabed provisions of the Law of the Sea Convention. Some of its provisions -- mostly coastal State rights, including the right to control MSR -- have been widely accepted and thus came to be considered as part of international law. However, other provisions -- mostly duties, including coastal State duties to foreign researchers regarding MSR -- were not adequately followed and thus are clearly binding only on States party to the Convention now that it has entered into force.

More specifically, the LOS Convention clearly recognizes the maximum breadth of the territorial sea is 12 nautical miles. Only those 17 States now claiming a broader territorial sea might disagree(22), and their number is steadily diminishing (23). Entry into force of the LOS Convention increases the pressure on them to roll back their claims. Within that territorial sea, the coastal State exercises complete sovereignty, and MSR is now clearly under its exclusive control. The LOS Convention explicitly provides that the coastal State has "the exclusive right to regulate, authorize and conduct" MSR in its territorial sea, which may be "conducted only with the express consent of and under the conditions set forth by the coastal State (24)." Further, the LOS Convention expressly states that the "carrying out of research or survey activities" makes passage through the territorial sea not innocent (25) and expressly authorizes the coastal State to enact laws and regulations relating to innocent passage through the territorial sea in respect of "marine scientific research" as well as "hydrographic surveys" (26).

Under the LOS Convention, the regime of passage through international straits does not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters (27). Accordingly article 40 provides that during transit passage through such straits, foreign ships, "including marine scientific research and hydrographic survey ships," may not carry out any research or survey activities without the prior authorization of the States bordering straits. The same rules apply to archipelagic sea lanes passage (28).

International law now recognizes the right of all coastal States to claim EEZS, that may extend seaward 200 miles from their territorial sea baselines, or to median lines where the opposite coasts are less than 400 miles apart. Indeed, some 90 coastal States have done so. (29) International law further recognizes that within its EEZ a coastal State may exercise jurisdiction over MSR (30). The LOS Convention provides the legal framework for the exercise of that jurisdiction (31).

International law also now recognizes the sovereign right of the coastal State to explore (and exploit) the natural resources of its continental shelf, which may -- as in the case of the United States -- extend beyond 200 miles, but in most cases no more than 350 miles from the territorial sea baseline (32). The Convention provides the legal framework for the exercise of MSR

jurisdiction on the continental shelf (33).

Seaward of the EEZ lie the high seas and the seabed beyond the limits of national jurisdiction. Here the LOS Convention clearly advances the rights of the scientific community by expressly recognizing, for the first time, that MSR is a freedom of the high seas that may be exercised by all States (34). Further, all States, as well as the International Seabed Authority, are permitted to carry out MSR in the seabed beyond national jurisdiction (35). On the other hand, the LOS Convention is silent regarding marine surveys seaward of the territorial sea.

#### MSR Under the LOS Convention

The conduct of MSR is fully regulated by Part XIII of the LOS Convention which does not apply to marine surveys of any sort. The Convention confirms the right of all States and competent international organizations to conduct MSR (36) and the duty to facilitate the conduct of MSR in accordance with the terms of the Convention (37). The Convention sets forth the rights and obligations of States and competent international organizations with respect to the conduct of marine scientific research in different areas.

#### TERRITORIAL SEA

Article 245 recognizes the unqualified right of coastal States to regulate, authorize and conduct marine scientific research in the territorial sea. Therefore, access to the territorial sea, and the conditions under which a research project can be conducted there, are under the exclusive control of the coastal State (38).

#### ARCHIPELAGIC WATERS

As archipelagic waters are under the sovereignty of the archipelagic State, marine scientific research is subject to the consent of that State (39).

#### INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES

Part XIII contains no provisions specifically targeted to international straits or archipelagic sea lanes. However, under article 40, during transit passage, marine scientific research and hydrographic survey ships "may not carry out any research or survey activities without the prior authorization of the States bordering straits. " The same rule applies to such ships exercising the right of archipelagic sea lanes passage (40).

#### EEZ AND CONTINENTAL SHELF

Under article 246, coastal States have the right to regulate, authorize and conduct marine scientific research in the EEZ and on the continental shelf. Access by other States or competent international organizations to the EEZ or continental shelf for a marine scientific research project is subject to the consent of the coastal State. The consent requirement, however, is to be exercised in accordance with certain standards and qualifications.

In normal circumstances, the coastal State is under the obligation to grant its consent to requests to conduct MSR in its EEZ or on its continental shelf. (It is explicitly provided that circumstances may be normal despite the absence of diplomatic relations.(41)) The coastal State, nevertheless, has the discretion to withhold its consent if the research project is of direct significance for the exploration and exploitation of living or non-living resources; involves drilling, the use of explosives or introduction of harmful substances into the marine environment; or involves the construction, operation and use of artificial islands, installations or structures. (42) (The first of these grounds for withholding consent may be used on the continental shelf beyond 200 miles only in areas specially designated as under development (43)). It may also withhold consent if the sponsor of the research has not provided accurate information about the project or has outstanding obligations in respect of past projects (44). If requested, the coastal State should state the reasons for denying consent, otherwise the researching State will not be in a

position to determine what adjustments would be required to enable the project to proceed (45).

The consent of a coastal State for a research project may be granted either explicitly or implicitly. Article 248 requires States or organizations sponsoring projects to provide to the coastal State, at least six months in advance of the expected starting date of the research activities, a full description of the project. The research activities may be initiated six months after the request for consent, unless the coastal State, within four months, has informed the State or organization sponsoring the research that it is denying consent for one of the reasons set forth in article 246 or that it requires more information about the project. If the coastal State fails to respond to the request for consent within four months following notification, consent may be presumed to have been granted (46). This provision should encourage timely responses from coastal States to requests for consent.

Consent may also be presumed under article 247 to have been granted by a coastal State for a research project in its EEZ or on its continental shelf undertaken by a competent international organization of which it is a member, if it approved the project at the time that the organization decided to undertake the project and it has not expressed any objection within four months of the notification of the project by the organization.

Article 249 sets forth specific conditions with which a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State must comply. These include the right of the coastal State to participate in the project, in particular through inclusion of scientists on board research vessels; provision to the coastal State of reports and access to data and samples; assistance to the coastal State, if requested, in assessing and interpreting data and results; and ensuring that results are made internationally available as soon as practicable. Additional conditions may be established by the coastal State with respect to a project falling into a category of research activities over which the coastal State has discretion to withhold consent pursuant to article 246.

If a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State fails to comply with such conditions, or if the research is not being conducted in accordance with the information initially supplied to the coastal State, article 253 authorizes the coastal State to require suspension of the research activities. If those carrying out the research do not comply within a reasonable period of time, or if the non-compliance constitutes a major change in the research, the coastal State may require its cessation.

## THE HIGH SEAS AND THE AREA

Article 87 expressly recognizes conduct of marine scientific research as a freedom of the high seas. Articles 256 and 257 further clarify that marine scientific research may be conducted freely by any State or competent international organization in the water column beyond the limits of the EEZ, as well as in the Area, i.e., the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (47). Under article 143, research in the Area is to be carried out exclusively for peaceful purposes.

## RESEARCH INSTALLATIONS AND EQUIPMENT

The conditions applicable to marine scientific research set forth in the Convention apply equally to the deployment and use of installations and equipment to support such research seaward of the baseline (48). Such installations and equipment do not possess the status of islands, though safety zones of a reasonable breadth (not exceeding 500 meters) may be created around them, consistent with the Convention. They may not be deployed in such fashion as to constitute an obstacle to established international shipping routes. They must bear identification markings indicating the State of registry or the international organization to which they belong, and have adequate internationally agreed warning signals (49).

## RESPONSIBILITY AND LIABILITY

Pursuant to article 263(1), States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf and wherever conducted seaward of the baseline, is conducted in accordance with the Convention. Pursuant to article 263 (2), States and organizations shall be responsible and liable for any measures they take in contravention of the Convention in respect of research by other States, their natural or juridical persons or by competent international organizations and shall provide compensation for damage resulting from such measures. With respect to damage caused by pollution of the marine environment arising out of marine scientific research undertaken by or on the behalf of States and competent international organizations, such States or organizations shall be liable pursuant to article 235 (50).

### Coastal State Practice Regarding MSR Under the LOS Convention

Many coastal States are complying with the MSR regime of the LOS Convention, (51) perhaps in no small part with the assistance of a practical guide to the implementation of the MSR provisions published in 1991 by the UN's Office for Ocean Affairs and the Law of the Sea. (52) Now that the Convention has entered into force, this booklet takes on increased importance in influencing States to comply with their particular duties.

There are, however, a number of States that are not complying with the Convention's MSR provisions. Some of them are party to the Convention (e.g., Brazil, Mexico); others are not (e.g., Chile, Colombia, Russia). The problems the United States has encountered include the following:

- delays in responding to requests for ship clearances (53)
- last minute denial of permission to conduct the research(54)
- requiring all data, regardless of format, be provided immediately prior to departure from last port of call(55)
- requiring the data to be provided within a fixed time after leaving the coastal State's waters, rather than after completion of the cruise (56)
- requiring copies of data collected in international waters, or in waters under another's country's jurisdiction (57)
- requiring data to be held in confidence and not placed into the public domain (58)
- requiring the cruise reports to be submitted in other than English (59)
- requiring more than one observer to be on board (60)
- requiring the observer to be on board during non-research legs of a voyage (61)
- requiring research and port call requests to be submitted other than through the Foreign Ministry (62)
- Foreign Ministry's failing to forward cruise reports to cognizant organization(63)
- finally, slow or incomplete staffing and coordination among interested coastal State bureaucracies (64)

### Value of the LOS Convention Today for MSR

The foregoing naturally casts doubt on the value, today, of the LOS Convention to the marine scientific community. That need not be the case.

The Convention is approaching universal acceptance. The Convention entered into force November 16, 1994, for more than 60 States, and is now in force for more than 70 States, including Brazil and Mexico, Germany, Italy and Australia. Many other industrialized countries have indicated they have taken political decisions to adhere to the Convention, including the United Kingdom, Japan, New Zealand and South Korea. Israel has announced that it too is reconsidering adhering to the Convention (65). Finally, as noted above, the President has transmitted the LOS Convention to the Senate for its advice and consent to accession.

Regarding MSR, the President's Letter of Transmittal stated: "In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities."(66) The Secretary of State's Report expanded on the importance of the Convention to MSR:

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities."<sup>(67)</sup>

So how can those coastal States be convinced to accept and carry out their new duties?

More than a decade's experience before the Convention entered into force suggests little hope for doing so outside the convention regime. However, in at least three ways the Convention helps make real the balance reflected in the Convention's terms?

First, States party to the Convention are legally bound by their treaty relationships to comply with the Convention's provisions which by their nature are more explicit than customary law.

Second, U.S. accession to the Convention would finally place it on a level playing field with other countries. Coastal States would no longer have the excuse that they were bound by the Convention and the United States was not - a significant political improvement.

Third, the Convention provides a scheme for resolving MSR disputes with coastal States. This, in and of itself, is an improvement over the present situation. Further, the dispute settlement regime is a major accomplishment. Indeed, it may provide the only way to restrain and roll back excessive coastal State constraints on the conduct of MSR.

#### MSR DISPUTE SETTLEMENT REGIME

Article 264 provides that "disputes concerning the interpretation or application of the provisions of [the LOS] Convention with regard to marine scientific research shall be settled" in accordance with the sections on "compulsory procedures entailing binding decisions" and the limitations and exceptions thereon, set out in Part XV, "Settlement of Disputes", Parts 2 and 3, respectively.

#### Fora

The Convention permits a State to choose one or more fora for the settlement of disputes concerning the interpretation or application of the Convention:

- the International Tribunal for the Law of the Sea, to be situated in Hamburg, Germany;
- the International Court of Justice, at the Hague;
- arbitration; or
- special arbitration.

(These are in addition to the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea for disputes under its jurisdiction.)

The President has indicated that the U.S. intends to elect arbitration and special arbitration where permitted by the Convention, and to exempt from compulsory dispute settlement (CDS) those activities permitted by article 298, including military activities, such as military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities, in regard to the exercise of sovereign rights or jurisdiction over marine scientific research (68).

#### CDS Regime for MSR

With regard specifically to MSR, the Convention provides that "disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled" by the compulsory dispute procedures<sup>(69)</sup>.



Unfortunately, article 272 (2)(a) goes on to carve out two substantial exceptions:

- the exercise by the coastal State of a right or discretion under article 246 concerning MSR in the EEZ and on the continental shelf; and
- a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253, because the research activities are not being conducted in accordance with the information communicated to the coastal State under which the consent was based; or the State fails to comply with the conditions established by the State under article 249 regarding participation, receipt of preliminary results, access to all the data and samples derived from the research, assessment of that data when requested by the coastal State, insuring international availability of the research results; informing the coastal State immediately of any major changes in the research program; or removal of the scientific research installations or equipment once the research is completed.

MSR exempted from CDS thus includes the following:

- the general right to regulate, authorize and conduct MSR in the EEZ or on the continental shelf (70) and
- the discretion to withhold consent for MSR in its EEZ or on the continental shelf if that project:
  - (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living. However, article 246 (6) precludes a coastal State from exercising its discretion to withhold consent if the project is to be undertaken on the continental shelf beyond 200 miles, and outside specific areas the coastal State has at any time publicly designated as "areas in which exploitation or detailed exploratory operations focused on those areas" are occurring or will occur within a reasonable period of time;
  - (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
  - (c) involves the construction, operation or use of artificial islands, installations and structures for economic purposes, and installations and structures which may interfere with the exercise of the rights of the coastal State in the EEZ or on the continental shelf; or
  - (d) contains inaccurate information communicated to the coastal State, or if the researching State has outstanding obligations to the coastal State from a prior research project.

Interim measures

There are two other provisions favoring the coastal State:

- Article 265, Interim Measures, provides that pending settlement of a dispute authorized MSR will not begin or continue "without the express consent of the coastal State concerned. "
- Further, the provisions of article 292 authorizing a tribunal or court to order the prompt release of vessels and crews applies by its terms only to detentions for fishing and pollution violations (71). Thus there is no guaranteed right of prompt release if a foreign research vessel were detained by the coastal State for violating its MSR laws and regulations.

Remedies for Improper Exercise of Discretion

What aspects of MSR then are subject to dispute resolution? Two important coastal State duties come to mind: The duty of the coastal State to grant consent, in normal circumstances, for MSR projects in the EEZ or on the continental shelf, and the duty to establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.

Although these may not appear to be very important, it seems that the very existence of these areas provides the researching State leverage over the coastal State that is not implementing the MSR regime consistent with the terms of the Convention.

In a situation where the United States now has very little leverage over recalcitrant coastal States, and there is little incentive for those States to change their laws, regulations or procedures, the mere fact that their non-compliance can be brought before third parties can only be an improvement in the present situation, and should lead to greater conformity with the MSR regime in the Convention.

Further, U.S. accession to the LOS Convention would provide the opportunity to try, an opportunity present while the United States remains outside the treaty regime.

Finally, U.S. accession to the Convention would enable the United States to consider establishing a Freedom of MSR Program analogous to the NSC-directed State-Defense Freedom of Navigation Program that since 1979 has helped conform state practice with the navigational provisions of the Convention (72). Similar results should be sought for MSR.

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## NOTES

(1) Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State. This paper is a revised version of a speech delivered at a conference on observing the oceans at the Woods Hole Oceanographic Institution on January 10, 1995.

(2) Accompanying Germany's instrument of accession to the LOS Convention was a declaration concerning marine scientific research, which reads as follows:

Although the traditional freedom of research suffered a considerable erosion by the Convention, this freedom will remain in force for States, international organizations and private entities in some maritime areas, e.g., the sea-bed beyond the continental shelf and the high seas. However, the exclusive economic zone and the continental shelf, which are of particular interest to marine scientific research, will be subject to a consent regime, a basic element of which is the obligation of the coastal State under article 246, paragraph 3, to grant its consent in normal circumstances. In this regard, promotion and creation of favourable conditions for scientific research, as postulated in the Convention, are general principles governing the application and interpretation of all relevant provisions of the Convention.

The marine scientific research regime on the continental shelf beyond 200 nautical miles denies the coastal State the discretion to withhold consent under article 246, paragraph 5(a), outside areas it has publicly designated in accordance with the prerequisites stipulated in paragraph 6. Relating to the obligation, to disclose information about exploitation or exploratory operations in the process of designation is taken into account in article 246, paragraph 6, which explicitly excluded details from the information to be provided.

Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994, UN Doc. ST/LEG/SER.E/13, at 859 (UN Sales No. E.95.V.5, 1995).

(3) When claiming its EEZ in 1983, the United States chose not to assert the right of jurisdiction over marine scientific research within the zone. President Reagan explain the rationale for not doing so, as follows:

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law .

President's Ocean Policy Statement, Mar. 10, 1983, 1 PUBLIC PAPERS OF THE PRESIDENTS: RONALD REAGAN 1983, at 378-79.

(4) Commentary, Sen. Treaty Doc. 103-39, at 80; 6 State Dept. Dispatch Supplement No. 1, Feb. 1995, at 44.

(5) The United Kingdom similarly acts on behalf of British scientists seeking authorization to conduct MSR in foreign waters. 56 Br. Y.B. Int'l L. 1985, at 500.

(6) 16 U.S.C. 1374(c).

(7) Accord, SOONS, MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA 124 (1982) (hereinafter, SOONS).

(8) Commentary on LOS Convention, Sen. Treaty Doc. 103-39, at 80: SOONS 125 (MSR differs from hydrographic surveys and resource exploration). In discussing MSR for military purposes, Soons (at 135) does not mention military surveys or other military activities.

(9) Cf. IHO Definition 40 [any better cite?]

(10) 10 U.S.C. 2791 et seq.

- (11) ROACH & SMITH, EXCESSIVE MARITIME CLAIMS 248, 66 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES (1994).
- (12) 1958 Convention on the Continental Shelf, 15 UST 47 1, TIAS 5578, 499 UNTS 31 1, article 5(l) & (8). SOONS 56-58 examines the meaning of these two paragraphs, concluding that the customary international law rules are essentially the same as those set out in paragraphs I and 8 of article 5.
- (13) 1958 Convention on the High Seas, 13 UST 2312, TIAS 5200, 450 UNTS 82, article 2.
- (14) The United Kingdom agreement with the position may be found in 56 Br. Y.B. Int'l L. 1985, at 501. The United States concurs in this position. Soon comes to the same conclusion after reviewing the travaux preparatoires state practice, and the views of publicists. SOONS 47-55.
- (15) 1958 Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, TIAS 5639, 516 UNTS 205. articles 1-2.
- (16) 56 Br. Y.B. Int'l L. 1985, at 501; SOONS 46.
- (17) 1958 Convention on Fishing and Conservation of Living Resources of the High Seas, 17 UST 138, TIAS 5969, 559 UNTS 285.
- (18) This regime is replaced by the detailed regime set out in the LOS Convention, for States parties to these treaties. LOS Convention, article 31 l(l).
- (19) SOONS 261.
- (20) de Marffy, Marine Scientific Research, in 2 A HANDBOOK ON THE NEW LAW OF THE SEA 1140 (Dupuy & Vignes eds, 1991) ('the balance is tipped much more in favour of coastal States than in favour of researching States, and. this is perhaps harmful to scientific research in general').
- (21) President's Ocean Policy Statement, supra n. 3.
- (22) Eleven of them claim a 200 mile territorial sea: Benin, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia, Uruguay. Cameroon claims a 50 mile territorial sea; Syria claims a 35 mile territorial sea; Nigeria and Togo claim a 30 mile territorial sea; Angola claims a 20 mile territorial sea. The Philippines claims a territorial sea which extends to 285 miles in some locations.
- (23) Sixteen States have rolled back their territorial sea claims to 12 miles since international agreement was reached on that limit: Albania, Argentina, Brazil, Cape Verde, Gabon, Germany, Ghana, Guinea, Guinea-Bissau, Haiti, Madagascar, Maldives, Mauritania, Senegal, Tanzania and Tonga. As recently as May 16, 1995, Panama announced at the second meeting of States Parties to the LOS Convention that it was considering rolling back its 200 mile territorial sea claim to 12 miles.
- (24) LOS Convention, article 245.
- (25) Id., article 19(2)0).
- (26) Id., article 21(l)(g).
- (27) Id., article 34(l).
- (28) Id., article 54.
- (29) For a recent list, see U.S. Dep't of State, Limits in the Seas No. 36 (Rev. 7, 1995).
- (30) LOS Convention, article 56(l)(b)(ii).
- (31) Id., article 246.
- (32) Id., article 76.
- (33) Id., article 246.
- (34) Id., articles 87(i)(f) & 257.
- (35) Id., articles 143 & 256.
- (36) Id., article 238.
- (37) Id., article 239.
- (38) See also id., articles 21(l)(g), 19(l@)O)), 40 and 54. There is no appeal if consent is refused or unreasonable conditions are imposed. 56 Br. Y.B. Int'l L. 1985, at 501.
- (39) SOONS 153.
- (40) LOS Convention, article 54.
- (41) Id., article 246(3)-(4).
- (42) Id., article 246(5)(a-c).
- (43) Id., article 246 (6).
- (44) Id., article 246 (5)(d).
- (45) IV UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 519, para. 246.17(b) (Rosenne & Yankov, eds. 1991).
- (46) LOS Convention, article 252.
- (47) If no EEZ is claimed, continental shelf restrictions apply only as stated in article 246.
- (48) LOS Convention, article 258.
- (49) Id., articles 259-262.
- (50) Id., article 263 (3).
- (51) The various legislative enactments are briefly summarized in UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, The Law of the Sea: Practice of States at the time of entry into force of the

United Nations Convention on the Law of the Sea (UN Sales No. E.94.V. 13, 1994), at 18, 37-38, 75-76, 83-84, 97-98, 134-35 & 182. National legislation is collected in UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas Under National Jurisdiction* (UN Sales No. E.89.V.9, 1989).

(52) UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Marine Scientific Research - A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (UN Sales No. E.91.V.3, 1991) (hereinafter, UN, MSR Guide). This pamphlet also suggests standardization of the forms for seeking consent and for granting permission to conduct marine scientific research in areas of national jurisdiction.

(53) The last sentence of article 246 (3) requires coastal States to establish rules and procedures ensuring that consent will not be delayed or denied unreasonably. The UN MSR Guide states the coastal State 'should therefore respond as quickly as can reasonably be expected to requests for consent.' UN, MSR Guide I 1, at para. 52.

(54) *Ibid.*

(55) Article 249(l)(b) sets no fixed time-limits for providing the preliminary reports, final results and conclusions of the research to the coastal State. Providing even a preliminary report prior to the ship's departure is not practicable. SOONS 190. Common practice is to provide the preliminary report 30 days after completion of the field portion of the research.

(56) The UN MSR Guide states that "[all efforts should be made to supply the final results and conclusions within a reasonable period of time" noting that the "time span between the end of the cruise and the availability of the final results can vary substantially depending upon the nature of the research.' UN, MSR Guide 19, para. 92. Final reports usually take a year or longer to prepare.

(57) The coastal State has no right under the Convention to receive such data, until it is made public.

(58) Article 249(l)(e) requires the data be made internationally available, unless it is of direct significance for the exploration and exploitation of natural resources. U.S. law requires that U.S. government-funded data must become part of the public domain. CITE

(59) The Convention is silent on this question. The UN MSR Guide recommends that consideration be given to providing the coastal State with reports 'written in a language which can be read by scientists of the coastal State.' UN, MSR Guide 19, para. 93.

(60) The right to participate under article 249(l)(a) is qualified to the extent that it must be 'practicable'. The UN MSR Guide notes that, if the right to participate is to be meaningful at all, the researching State "must always reserve space for at least one coastal State scientist on board,' while recognizing only in extreme situations would that be impracticable, such as on a two- or three-man submersible. The Guide also cautions that "excessive demands should not be made'. UN, MSR Guide 16, para. 78. Consistent with the UN MSR Guide conclusion that "[the coastal State may be able to claim more than one participant only if, and to the extent that, there is space available," two scientific participants are generally permitted on board U.S. research vessels when space allows. However, there may be occasions when participation is not practical, or, conversely, when more than two may participate. Accord, Soons 189.

(61) This is not authorized by article 249.

(62) Under article 250, all communications concerning marine scientific research projects "shall be made through appropriate official channels, unless otherwise agreed.' Soons states that it is always most safe to use diplomatic channels. SOONS 193.

(63) To avoid problems the UN MSR Guide recommends also sending a copy directly to the coastal State scientists involved. UN, MSR Guide 19, para. 90. The Guide also recommends the researching State expressly inform the coastal State involved, after all results and conclusions of a research project have been provided to it, that all obligations related to a specific research project have in its opinion been fulfilled, to avoid invocation of article 246 (5) by the coastal State to withhold consent to future projects because of outstanding obligations to it from a prior research project. UN, MSR Guide 20, para. 99.

(64) The UN MSR Guide points out the need for the coastal State to have a single office to process applications for consent and be able to coordinate the request among the relevant government agencies. UN, MSR Guide 9, paras. 42, 43, 46.

(65) State Dep't Dispatch Supplement No. 1, Feb. 1995, at 53.

(66) Sen. Treaty Doc. 103-39, at IV; 6 State Dept. Dispatch Supplement No.1, Feb. 1995, at 1.

(67) Sen. Treaty Doc. 103-39, at VII; 6 State Dept. Dispatch Supplement No. 1, Feb. 1995, at 2.

(68) Sen. Treaty Doc. 103-39, at IV, X; 6 State Dept. Dispatch Supplement No. 1, Feb. 1995, at 1, 4.

(69) LOS Convention, article 297(2).

(70) *Id.*, article 246(i).

(71) See *id.*, articles 73 (2), 220(7) and 226(l)(b); cf. article 27 (3).

(72) See ROACH & SMITH, *EXCESSIVE MARITIME CLAIMS*, Chapter 1.

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## **APPENDIX XIII. Scheduling Procedure Review**

### **SCHEDULING PROCEDURE REVIEW**

A Ship Scheduling Procedure Review Committee chaired by Rick Jahnke met 7 January 1997 to address perceived weakness in the ship scheduling process. These were